

BEFORE THE  
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
DEPARTMENT OF INDUSTRIAL RELATIONS  
STATE OF CALIFORNIA

In the Matter of the Appeal  
of:

**AMERICAN ROOF SYSTEM**  
1160 Chess Drive  
Foster City, CA 94404

Employer

DOCKET(S) 96-R2D2-1184

**DECISION**

**Background and Jurisdictional Information**

Employer installs roofs and roof systems. On January 9, 1996, while investigating an accident that occurred at another location, Carla Fritz, an Associate Safety Engineer for the Division of Occupational Safety and Health (the Division), went to a sales office maintained by Employer at 2641 N. Main St., Walnut Creek, California (the site),<sup>1</sup> to conduct an opening conference and review Employer's log of injuries and illnesses (Log 200) for that location.

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<sup>1</sup>The citation lists 2841 St. Joseph Drive, Concord, California as the "inspection site". An employee was injured installing a roof on a house at that address but the inspection site germane to Employer's appeal is the Walnut Creek sales office.

On April 1, 1996, as a result of Ms. Fritz's inspection, the Division issued to Employer Citation 1, Item 1, alleging a regulatory violation of § 14301(c)(2) [Log of Occupational Injuries and Illnesses] of the occupational safety orders and health standards found in Title 8, California Code of Regulations<sup>2</sup>, and Citation 1, Item 2, alleging a general violation of § 3203(a)(7)(D) [injury and illness prevention training]. Civil penalties of \$150 and \$110, respectively, were proposed for the alleged violations.

Employer filed a timely appeal contesting the existence of the alleged violations and the amounts of the proposed civil penalties.

This matter came on regularly for hearing before Dennis M. Sullivan, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Concord, California, on February 11, 1997, at 9 a.m. Gary Cannon, Attorney, represented Employer. Carla Fritz, Associate Safety Engineer, represented the Division. Oral and documentary evidence was introduced by the parties and the matter was submitted on February 11, 1997.

### **Law and Motion**

In a prehearing order dated January 28, 1997, Administrative Law Judge Manuel Melgoza granted the Division's motion to withdraw Citation 1, Item 2 and the corresponding \$110 proposed civil penalty. The prehearing order is incorporated herein by reference and attached as Exhibit A.

### **Docket 96-R2D2-1184**

Citation 1  
Item 1  
Regulatory

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<sup>2</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

§ 14301(c)(2)

**Summary of Evidence**

Employer was cited because a copy of Employer's Log 200 for the Walnut Creek sales office was not at that location on January 9, 1996.

Carla Fritz, Associate Safety Engineer, testified for the Division. On January 9, 1996, she went to the sales office to conduct an opening conference with Sales Manager John Musgrove. The sales office consisted of a reception area, an open area containing some desks and chairs and two or more smaller, individual offices. In addition to Mr. Musgrove, Ms. Fritz observed a receptionist and a man who entered one of the individual offices.

She asked Mr. Musgrove for a copy of the Log 200 listing the work injuries and illnesses of sales office employees. Mr. Musgrove informed her that the Log 200 for the sales office was maintained at Employer's headquarters in Foster City, California, and that a copy was not available at the sales office. Accordingly, the Division cited Employer for a regulatory violation of § 14301(c)(2) and proposed a \$150 civil penalty.

Using the proposed penalty worksheet (Division Exhibit 2) as a guide, Ms. Fritz explained how the penalty had been calculated in accordance with the Director's penalty setting regulations.

Jerome Ullman, General Manager, testified for Employer. Employer's Logs 200 for Employer's headquarters, the Walnut Creek sales office and other locations are maintained under his direction, at the Foster City headquarters. He identified "Exhibit A", which is included in Division Exhibit 1, as a copy of the 1995 Log 200 applicable to the sales office. It was at all times available for inspection in Foster City and Employer made a copy of it available to the Division.

Paychecks are issued in Foster City and employee training and other such matters are conducted there. Hence, sales office employees frequently visit headquarters.

According to Mr. Ullman, approximately 10 employees are assigned to the sales office. They include the receptionist, canvassers who solicit roof work, inspectors who determine the nature and extent of prospective work jobs, a manager who, among other things, formulates bids for roof jobs from the information furnished by the inspectors, and sales persons who present the bids to the prospective customers.

When a customer signs a contract the sales manager reviews it and, if it appears to be in order, he forwards the contract to headquarters for final approval. After final approval, Employer assigns roofers who work from an equipment and materials yard in San Mateo to do the job.

Ron Bumman, Director of Safety and Health for a company named Builders Staff, testified for Employer. Builders Staff is a large, multi-state general and engineering contractor which also provides safety and health consulting and bookkeeping services to a number of smaller construction employers.

Mr. Bumman testified that Employer was a Builders Staff client and that all Builders Staff training and other services for Employer were performed at the Foster City headquarters.

He pointed out that Employer was engaged in dispersed construction operations and he considered the Foster City headquarters to be Employer's central place of business. Accordingly, he believed that § 14313, which sets Log 200 maintenance and availability requirements for "employees not in fixed establishments", applied to Employer. And, since an appropriate Log 200 for the sales office was available at Employer's central place of business in Foster City, it

was Mr. Bumman's opinion that Employer was in compliance with the applicable Log 200 requirements.

### **Findings and Reasons for Decision**

THE SALES OFFICE IS AN ESTABLISHMENT. A COPY OF THE LOG 200 FOR SALES OFFICE EMPLOYEES WAS NOT AVAILABLE AT THAT ESTABLISHMENT ON JANUARY 9, 1996.

EMPLOYER MADE A GOOD FAITH EFFORT TO COMPLY WITH LOG 200 REQUIREMENTS. ASSESSMENT OF A CIVIL PENALTY WOULD BE UNREASONABLE.

§ 14301 sets the Log 200 requirements applicable to all employers but those excepted by other provisions such as § 14313 [employees not in fixed establishments] and § 14314 [small employers].

Employer was cited under subsection (c)(2) of § 14301 which reads:

“(c) Any employer may maintain the log of occupational injuries and illness in any place other than the establishment or by means of data processing equipment, both, under the following circumstances:

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“(2) at each of the employer's establishments there is available a copy which reflects separately the injury and illness experience of that establishment, complete and current to a date within 45 calendar days.”

§ 14311(e)(1) defines “Establishment” in these terms:

“for private employers, an establishment is a single, physical local business is conducted or where services or industrial operations are performed (For example: a factory, mill, store, hotel, restaurant, movie theater, factory, bank, sales office, warehouse, or central administrative office.) ....” added.)

The testimony of Ms. Fritz and Mr. Ullman prove that Walnut Creek sales office is a “physical location” where Employer conducted the business of marketing and selling (

Based on Mr. Ullman’s testimony, it is found that the sales manager and a receptionist spent most of their work time at the sales office. Based on his testimony and the presence of a large open area of the office, it also is found that, in the ordinary course of their duties, other persons went the sales office to receive assignments, report back to the sales manager, and perform work related activities. Based on these findings, it is found that Employer violated the law by not having a copy of the Log 200 available at the sales office.

As Employer pointed out, an employer whose employees work at “physical locations” and whose employees “do not primarily report or work at a single establishment”, are excepted from Log 200 requirements by more specific requirements applicable to those work conditions (14311(e)(3), 14311(e)(4) and 14313.) (§)). However, even if it were found that the company’s sales persons engaged in physically disbursed operations and did not report to the sales office or “on a regular basis”, neither the sales manager nor the receptionist would fit the exception. Accordingly, it is found the Employer failed to establish an exception to its duty, and must have a copy of the Log 200 for the sales office available at that establishment.

Ms. Fritz’s testimony and the proposed penalty worksheet (Division Exhibit 2) show that the \$150 proposed civil penalty was calculated in accordance with the Director’s penalty schedule. However, she also acknowledged that Employer maintained an adequate sales office at its City headquarters and that the failure to have a copy available at the sales office was a “technical” consequence only.

From the testimony of Mr. Ullman and Mr. Bumman and the arguments presented, it is clear that the violation resulted from a good faith misinterpretation of some rather technical provisions and that Employer was making a conscientious effort to comply. Under the purposes of the California Occupational Safety and Health Act of 1973, we are not assessing a civil penalty. Accordingly, the \$150 proposed civil penalty is found to be set aside.

Dated: March 8, 1997

DENNIS M. SULLIVAN  
Administrative Law Judge